IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 430

SAMUEL M. ATKINSON, ET AL.,
Petitioners,

vs.

SINCLAIR REFINING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

Relevant contract provisions (A. 25) not set forth in the Petition for Certiorari are as follows:

"ARTICLE III.

* * * * *

"3. Union further agrees that during the term of this Agreement there shall be no strikes or work stoppages:

"(1) For any cause which is or may be the subject of a grievance under Article XXVI of this Agreement, * * *"

"ARTICLE XXVI.

"GRIEVANCE AND ARBITRATION PROCEDURE.

"DEFINITION.

"1. A grievance is defined to be any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations.

"GRIEVANCE PROCEDURE.

"It is the sincere desire of both parties that employee grievances be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:

"2. For the purpose of adjusting employee grievances and disputes as defined above, it is agreed that any employee, individually or accompanied by his committeeman, if desired shall:

"(a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. * * *;

"(b) If the question is not then settled, the employee may submit his grievance in writing, on forms supplied by Union, to a committee selected as hereinafter provided for the particular plant or region in which such employee is employed. Such committee shall investigate said complaint and if in its opinion the grievance has merit it shall have the right to meet with the local company superintendent or his representative, who shall receive the committee for this purpose. * * *.

"3. No complaint or grievance shall be considered hereunder unless it is presented to the superintendent or official locally in charge within sixty (60) days from the date on which the complaint or grievance arose, or

from the date on which the employee or employees concerned first learned of the cause of complaint.

"4. The committe above mentioned shall be selected from among and by employees of the Employer who are members of the Union.

"5. When any employee is discharged for cause or is given a disciplinary suspension, he shall prior thereto or promptly thereafter be given a written statement dated and signed by his foreman or other Employer representative setting forth the reason for such discharge or suspension. The Workmen's Committee will be furnished with a copy of any such statement furnished to the employee. * * *.

"6. In the event the decision of the superintendent or his representative shall not be satisfactory to the committee, it is agreed that the President of the Oil, Chemical and Atomic Workers International Union, or someone designated by him, shall, not later than forty-five (45) days after such decision, have the right to confer with the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, for the purpose of discussing grievances or disputes and of obtaining decisions thereon. * * *.

"7. If such decision is not satisfactory, then, upon request of the President or any District Director of the Oil, Chemical and Atomic Workers International Union and within sixty (60) days from the posting date of the final appeal answer, there shall be set up a local Arbitration Board, and such grievances and disputes submitted to it within ten (10) days after formation of such Board. * * *. These local Arbitration Boards shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement, or supplements thereto, and local wage and classification disputes submitted on the initiative of the President or any District Director of the Oil, Chemical and Atomic Workers International Union. * * *.

"8. The above-mentioned local Arbitration Board shall be composed of one person designated by Em-

ployer and one designated by the President or District Director of the Oil, Chemical and Atomic Workers International Union. The two member Board shall meet within sixty (60) days from the date of its formation and endeavor to render a decision on the complaint, which if reached, shall be in writing. Should the two-member Board be unable to agree on such decision or to agree upon an impartial third Arbitrator, they shall at such meeting jointly petition the Federal Mediation and Conciliation Service to submit a panel of arbitrators from which the third member of the Board shall be selected as promptly as reasonably practical in accordance with the procedure of such Federal Mediation and Conciliation Service.

"In the event the two-member Board fails to meet within the aforesaid sixty (60) day period, or any extension thereof arrived at by mutual agreement, either member, or jointly, may petition the Federal Mediation and Conciliation Service for the purpose hereinabove set forth.

"9. The decision of the Board aforesaid, as provided in Section 8 hereof, shall be final. * * *."

REASONS FOR DENYING THE WRIT.

1. The portiors of the decision which the Union seeks to have reviewed are not final; they are merely interlocutory rulings holding two counts of a complaint good as against motions to dismiss them. What final judgments will be entered on these counts cannot now be known.

The procedural posture of the counts involved is quite different from the procedural posture of the count in respondent's companion petition, No. 434 this term, in which respondent seeks certiorari from the final judgment dismissing the count (of the same complaint) which prayed an injunction against strike activity, in violation of the contract, over asserted employee grievances which the contract required be submitted to binding arbitration. (Cf.

Chauffeurs, Teamsters & Helpers Union v. *Yellow Transit Lines,* No. 13 this term, presenting another facet of the basic problem presented by respondent here in No. 434. In No. 434 we suggest the petition therein should be considered with No. 13, for both No. 434 and *Yellow Transit* although arising from no-strike clauses, present differences which the Court well may wish, we believe should, consider at the same time.)

2. The petition's intricate list of supposed "Questions Presented" demonstrates that neither Count I nor II has yet been crystallized to any specific question of general importance that might warrant certiorari. The involved list of questions is merely an example of possibilities that an active legal imagination, in the early stages of litigation, can conceive may ultimately arise.

3. On the asserted issue as to whether an employer must seek his remedy for breach of a no-strike covenant through arbitration rather than through the courts there is no conflict between the Courts of Appeal. Resolution of that issue depends upon construction of the particular contract involved rather than upon a question of general law. *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U. S. 574, 582, made it clear that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit". There neither is, nor can be, any dispute between Courts of Appeal as to that proposition. However, Court A may find a particular contract does not contain an agreement to submit such a dispute to arbitration while Court B may find a different contract does contain such an agreement. So long as the Courts of Appeal seek to apply the test of *Warrior,* this Court obviously cannot review each decision to see whether a particular contract has been construed correctly. And certainly not this case, for petitioners' failure to point to

a single provision of the contract requiring arbitration o employer claims of breach of the no-strike clause demo strates that the Court of Appeals (and the District Court correctly decided that violation of the no-strike covenan is not "a subject which [respondent] has contracted t submit to arbitration." (Pet. p. 29.) The elaborate co tract provisions as to the manner of processing, and i necessary, of arbitrating, employee grievances which w have quoted herein, emphasize the absence of any prov sion limiting the employer's right to [illegible]e or providing fo or permitting, it to initiate an arbitration against em ployees or unions. Not only is there no provision for th initiation of an arbitration by the employer but Sectio XXVI, 7, quoted, *supra*, permits Arbritation Boards t "consider only individual or local employee or local com mittee grievances" etc. The Court of Appeals understood and properly applied, the test of *Warrior*. (Pet. pp. 29-30.)

It is prayed that the writ be denied.

Respectfully submitted,

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October 3, 1961.

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI IN ORDER TO CITE ADDITIONAL AUTHORITY.

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI IN ORDER TO CITE ADDITIONAL AUTHORITY.

To: *The Honorable Tom Clark,*
Associate Justice of the
Supreme Court of the United States:

Petitioners respectfully pray that the Court accept this Supplement to our Petition for Writ of Certiorari filed on or about September 22, 1961, in order to cite recent and significant additional authority. In support thereof, Petitioners say as follows:

1. Subsequent to September 22, 1961, your petitioners received notice that the Court of Appeals for the Second Circuit, en banc, in *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers' International Union,*

AFL-CIO, ... F. 2d (1961), 48 LRRM 2987 reversed its former decision in the same case reported in 287 F. 2d 155 (1961). The effect of the Second Circuit's en banc decision was to affirm the ruling of the United States District Court for the Southern District of New York reported in ..... F. Supp. ..... (1960), 46 LRRM 2143.

2. The recent decision of the Second Circuit in *Drake Bakeries* has significant implications as to whether this court will grant certiorari on the basic question set forth on page 2 of our Petition for a Writ of Certiorari: whether a Federal District Court is required to dismiss or, in the alternative, to stay a suit for damages for breach of the no-strike clause of a collective bargaining agreement brought by an employer against a union under Section 301 of the Labor Management Relations Act (1947) as amended (61 Stat. 136; 29 U. S. C. 141) pending arbitration of the dispute pursuant to the bargaining agreement.

The *Drake* decision heightens the already existing conflict between the Second Circuit and the Seventh Circuit of this very significant question. The Federal District Court in *Drake* stayed a suit for damages brought by an employer against a union for alleged breach of a no-strike provision in their collective bargaining agreement. The Federal District Court ordered the parties to first submit their dispute to arbitration as provided by the agreement. The effect of the en banc decision of the Second Circuit is to affirm the decision of the Federal District Court. In a per curiam opinion, the Second Circuit sitting en banc relied upon the decisions of this Court in *United Steelworkers* v. *American Manufacturing Co.,* 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Company,* 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960); *United Steeelworkers* v. *Warrior & Gulf Navigation Company,* 363 U. S. 574, L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

The Court of Appeals for the Seventh Circuit in its opinion in the subject litigation, cited the first decision of the Second Circuit in *Drake Bakeries* in support of its conclusion that the alleged breach by the defendant unions of the no-strike clause of the subject collective bargaining agreement is not susceptible to arbitration. (See decision of the Court of Appeals for the Seventh Circuit, Appendix B page 30 Petition for Writ of Certiorari.) The Seventh Circuit's opinion was published prior to the reversal by the Second Circuit in its en banc proceeding cited above.

3. We refer the court to an earlier decision of the Second Circuit in *Signal Stat.* v. *U. E.*, 235 F. 2d 298 (1956), cert. den'd, 354 U. S. 911 (1957) and decisions from other circuits demonstrating the sharp conflict existing among the courts of appeal on this important question prior to the *Drake* decision. (See Petition for Writ of Certiorari, page 10.)

Respectfully submitted,

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